Supreme Court, U.S.
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No. 97-1790

In The

Supreme Court of the United States

October Term, 1997

MICHAEL LAWSON and EDIE TUCKER,

Petitioners,

v.

ELRICK MURRAY and BELINDA MURRAY,

Respondents.

On Petition For Writ Of Certiorari To The Superior Court Of New Jersey, Appellate Division

REPLY BRIEF

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ARGUMENT

In this case, the trial court granted (and the Appellate Division affirmed) an injunction restricting peaceful public expression – carrying signs while walking a route in front of an entire block of houses – without any tortious or otherwise unlawful conduct on the part of petitioners. Respondents concede that this is what happened, but defend the judgment below by repudiating any need to show "prior unlawful conduct" as a precondition for an injunction against expressive activity.[1] Opp. at 6. Not only is this proposition entirely at odds with the constitutional right to free speech, *e.g., Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994), but also it directly conflicts with decisions of the Supreme Courts of Texas and Ohio, *Valenzuela v. Aquino*, 853 S.W.2d 512, 513-14 (Tex. 1993) ("There may be limits on residential picketing, . . . but it is not unlawful per se"); *City of Seven Hills v. Aryan Nations*, 667 N.E.2d 942, 947 (Ohio 1996).

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[1] In this regard, respondents merely repeat the position of the New Jersey courts which was first articulated in *Murray v. Lawson*, 642 A.2d 338 (N.J.), *vacated*, 513 U.S. 802 (1994), *modified*, 649 A.2d 1253 (N.J. 1994), *cert. denied*, 515 U.S. 1110 (1995). *See, e.g., Options v. Lawson*, 670 A.2d 1081, 1086 (N.J. App. Div. 1996) (reading *Murray* as a case "in which a residential picketing injunction . . . was sustained absent previous disorderly or unlawful conduct"); William A. Dreier & Paul A. Rowe, *Guidebook to Chancery Practice in New Jersey* 146 (4th ed. 1997) (reading *Murray* as allowing a permanent injunction against picketing "that does not violate any criminal laws and does not constitute a tort").

Citing *Frisby v. Schultz*, 487 U.S. 474, 486 (1988), respondents insist that residential picketing is a method of expression that "inherently and offensively" interferes with residential privacy. Opp. at 6. Echoing the New Jersey courts (6a), respondents rip the *Frisby* quotation completely out of context, conveniently ignoring the fact that this Court was discussing targeted picketing taking place solely in front of a single residence and not residential picketing in general. Indeed, both *Frisby* and *Madsen* stand squarely for the proposition that "walking a route in front of an entire block of houses" is an expressive activity protected by the First Amendment. Engaging in this protected activity is simply not a valid basis for the issuance of an injunction.

Nevertheless, respondents argue that *Madsen* does not require a showing of "prior wrongful conduct" and "plainly contemplates small picket-free zones as permissible means of serving the state interest in residential privacy." Opp. at 8-9. They base this argument on the assertion that "no crime or tort had been committed by the demonstrators" in *Madsen* in relation to residential activities. *Id.* at 6. This assertion is simply wrong. The *Madsen* Court itself repeatedly stated that there had been "prior wrongful conduct," and the findings under review in *Madsen* made it clear that this misconduct (including focused picketing taking place solely in front of a single residence) had occurred in residential settings as well as commercial areas. *Operation Rescue v. Women's Health Ctr., Inc.*, 626 So. 2d 664, 677-78 (Fla. 1993). Thus, *Madsen*'s suggestion that a "smaller zone" might be appropriate, 512 U.S. at 775, referred to a remedial injunction for specific misconduct; it was not an open invitation for the

automatic issuance of injunctions against peaceful picketing as well. A narrowly drawn prior restraint is still a prior restraint, even if it is carefully crafted by a conscientious judge after a trial and due consideration of the neighborhood and the competing interests of the parties.

In short, respondents' Brief in Opposition concedes that the injunction below is not remedial in nature, highlights a direct conflict of authority on the need for a showing of prior wrongful conduct, grossly distorts the meaning of *Frisby* and *Madsen*, and directly assaults the doctrine of prior restraints. The facts are admittedly undisputed and starkly present important constitutional issues that are hotly disputed. These are compelling reasons for granting the petition in this case; they underscore both the opportunity and the need for this Court to affirm and clarify the applicability of the doctrine of prior restraints to injunctions against residential picketing.

The same is true of the issue of content-neutrality. Respondents concede, as they must, that the New Jersey courts relied upon the message on the picketers' signs as a justification for the injunction. Opp. at 7. Nevertheless, respondents argue that the injunction is not content-based because the courts below did not rely "exclusively" upon sign content. *Id.* Aside from the obvious flaws of this argument (unconstitutional censorship becomes no less noxious when content is only "partially" relied upon), respondents' contention highlights a more fundamental flaw in the decision below.

The New Jersey courts, like respondents, erroneously concluded that all residential picketing is "targeted" –

and therefore subject to restriction – whenever a particular person is the subject (i.e., the "target") of the picketing. This completely confuses the analysis of this Court in *Frisby*. That decision upheld an *ordinance* banning "focused picketing taking place solely in front of a particular residence," 487 U.S. at 483. Equating the *physical* targeting in *Frisby* with the *topical* targeting in the present case is a gross misreading of *Frisby*. All residential picketing will have a topical target; "otherwise it is not really picketing." *Vittitow v. City of Upper Arlington*, 43 F.3d 1100, 1107 (6th Cir.), *cert. denied*, 515 U.S. 1121 (1995). The decision below thus conflicts directly with *Frisby*, *Vittitow*, and the numerous other courts that have properly read *Frisby* to concern only physical conduct (picketing solely in front of one house) and not the subject matter of the picketing. *See* Pet. at 16-17 n.6 (listing cases).

Respondents straightforwardly acknowledge the conflict among the lower courts, arguing that the many decisions contrary to the decision below are simply wrong. Opp. at 11 & n.1. Respondents have the law backwards, of course. In any event, they have clearly demonstrated a direct conflict of authority meriting this Court's review.

Furthermore, respondents suggest that the injunction was issued to protect them from feeling threatened by petitioners. Opp. at 3. However, the undisputed record shows that petitioners have been picketing for over six years in a completely peaceful and lawful manner; there is absolutely no factual justification for respondents' purported perception of a threat by petitioners. *See Hanzo v. deParrie*, 953 P.2d 1130, 1139-42 (Or. Ct. App. 1998) (in order to avoid intrusion upon free speech, a finding of threat can be made "only if [the] expression or other

associated conduct so unambiguously, unequivocally, and specifically communicated the . . . determination to cause harm that an objectively reasonable person . . . would fear for his or her personal safety"). *See also Keefe*, 402 U.S. at 419 ("The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment"); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) ("Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action").

The constitutional right of free speech cannot be abridged merely because the audience may be upset by expressive activities. *E.g., United States v. Eichman*, 496 U.S. 310, 318-19 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989); *Cohen v. California*, 403 U.S. 15 (1971). Indeed, reliance upon audience reaction as a rationale for restricting speech renders the restriction content-based. *E.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation"); *Boos v. Barry*, 485 U.S. 312, 321 (1988) ("The emotive impact of speech on its audience is not a 'secondary effect' "). Thus, the injunction below is content-based because it is justified not only by reference to the content of the picketers' signs, but also by reference to respondents' self-serving claim that they feel intimidated by admittedly peaceful picketers.

Nor is there any merit to respondents' reliance upon the trial court's speculation that they would be "under

siege" in the absence of an injunction.[2] Opp. at 4. The undisputed record shows that petitioners have an unblemished six-year history of peaceful picketing in various residential neighborhoods, some of which are not covered by injunctions. The record is devoid of even a hint of a "siege" in any of these neighborhoods; petitioners have adhered strictly to their practice of walking a route in front of an entire block of houses, without lingering in front of any given house. Thus, there is no objective factual support for the suggestion that petitioners may misbehave in the absence of an injunction. Nor is it permissible under the First Amendment (not to mention the due process clause) to restrict picketing on the basis of predictions of future misconduct. *E.g., Seven Hills*, 667 N.E.2d at 947-48 ("avoiding a *potential* threat to public order through provocative speech is not a compelling government interest").

Respondents attempt to justify the requirement of 24 hours' advance notice on the ground that it is necessary to protect public safety by giving the police time to arrange for adequate staffing.[3] Opp. at 15. However, there

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[2] By relying on the potential for a future "siege," respondents implicitly concede that there is no past or present "siege." This confirms that there is no "captive audience" problem in this case. *See* Pet. at 7 & n.2.

[3] Respondents' reliance upon parade permit cases is frivolous. Advance notification is required for parades because the police need time to plan and execute the blocking of public streets and the altering of traffic patterns along the parade route. These considerations are simply not applicable to picketing on a public sidewalk or along the side of a public street.

is no factual basis in the record for concluding that *any* police presence is required during the picketing. It is undisputed that petitioners have picketed for over six years without any incident of violence, disorderly conduct or other problem requiring police intervention. This is true not only of demonstrations observed by the police, but also of demonstrations where no police were present. Therefore, advance notification burdens more speech than is necessary because it is not justified by any facts in this case. Moreover, New Jersey's public safety rationale is in direct conflict with a recent decision of the Supreme Court of Ohio. *Seven Hills*, 667 N.E.2d at 948 ("Because society should bear the expense of guaranteeing free speech no matter how offensive, the city's desire to reduce its burden in providing police resources is not a *compelling* government interest").

In sum, respondents' Brief in Opposition further demonstrates the doctrinal error and confusion that permeates the decision below. Respondents also concede and delineate the direct conflict of the decision below with numerous federal and state authorities. Because the error, confusion and conflict relate to important constitutional issues that are frequently litigated throughout the country, it is imperative that they be resolved by this Court. Otherwise, the fundamental right of free speech will remain at risk of suppression and constitutional doctrine will continue to erode. As conceded by respondents, the record in this case (which includes videotapes of the demonstrations) is clear, well-developed and remarkably undisputed. Accordingly, this case presents an outstanding vehicle for the intervention of this Court to address issues of national importance and to affirm and clarify

fundamental principles of First Amendment jurisprudence.

CONCLUSION

This Court should grant the petition for a writ of certiorari and summarily reverse the decision below.

Respectfully submitted,

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